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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

BENJAMIN CAIN,
doing business as
CAIN'S TRUCK LINES,
Petitioner

v.

CLARA BOWLBY,
Respondent

No. 552

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

ROBERT L. HOLLIDAY,
El Paso, Texas

HAROLD L. SIMS,
El Paso, Texas

Attorneys for Petitioner.

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v.

CLARA BOWLBY,
Respondent

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Benjamin Cain, doing business as Cain's Truck Lines, respectfully presents this, his petition for certiorari to the Honorable Circuit Court of Appeals of the United States, for the Tenth Circuit, and to such end respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit for damages under the New Mexico penal death statute by respondent, Clara Bowlby, against petitioner growing out of a collision between two motor vehicles upon a public highway in the State of New Mexico on August 6, 1938. One of the vehicles was a large motor truck belonging to petitioner, who was at that time engaged in the business of a common carrier of freight for hire by motor vehicle, operating a line of trucks between Oklahoma City, Oklahoma and Los Angeles, California. The truck of petitioner was on its regular run from Los Angeles to Oklahoma City, and at the time of the accident was loaded with a heavy cargo of freight, and was in charge of one of petitioner's drivers. Petitioner was operating under and by virtue of a certificate of public convenience and necessity issued to him by the Interstate Commerce Commission, and authorizing him to carry freight, but not passengers, in interstate commerce. (R. 6-8, 19-21, 204-205.)

The other vehicle was a Buick coupe in which respondent and her husband, Dr. L. M. Bowlby, were riding. In the collision, respondent's husband, Dr. Bowlby, was killed and the Bowlby automobile was damaged. (R. 6-8, 19-21, 204-205.)

Respondent sued petitioner in her individual capacity to recover the New Mexico statutory penalty of $7,500.00 for the death of her husband, and also asked for the further sum of $800.00 as damage to the Bowlby automobile. She alleged that petitioner's truck was negligently operated on the occasion in question. (R. 6-8).

The New Mexico statute (Chapter 36, Section 101, Compiled Statutes of New Mexico, 1929, as amended) upon which respondent exclusively based her claim for the $7,500.00 penalty for the death of her husband (R. 6-8, 204-205) is as follows:

> "Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any stage coach or other public conveyance, while in charge of same as driver; and when any passenger shall die from injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of Seven Thousand Five Hundred Dollars, which may be sued and recovered; first, by the husband or wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother; or, fourth, if the deceased be over twenty-one years of age and unmarried, by a dependent father or mother or dependent brother or sister, who may join suit; and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall

be competent for the defendant for his defense to show that the defect or insufficiency named in this section, was not of a negligent defect or insufficiency."

As said in the majority opinion of the Circuit Court of Appeals:

> "The statute was initially enacted in 1882, and was the first section of a general act relating to damages for wrongful death. As originally enacted it authorized the recovery of $5000. By the amendment of 1931 the authorized sum was increased to $7500, and a dependent father or mother or dependent brother or sister of an unmarried deceased over the age of twenty-one years was included among those entitled to maintain an action. The second and third sections in the original act were addressed to the recovery of compensatory damages in other cases of wrongful death ,and with certain changes which are not material here they are now sections 36-102 and 36-104, N. M. Comp. St. 1929." (R. 204).

For convenience said sections 36-102 and 36-104 are fully copied in the appendix hereof.

Petitioner contended in the trial court and in the Circuit Court of Appeals (R. 205) that said penal statute (36-101) was not applicable to petitioner's motor freight truck and driver, in that said truck was not a locomotive, car or train of cars, nor was it "a stagecoach or other public conveyance." Petitioner further contended and now contends that the cause of action, if any, for the death of respondent's husband comes within the general death statute allowing compensatory damages with neither maximum nor minimum amounts, that is, Section 36-102 of the New Mexico Compiled Statutes, 1929, and that under

Section 36-104 it is enforceable only by a personal representative of the estate of the deceased. (R. 205.)

The trial court held that the death action was properly based upon said Section 36-101 and so instructed the jury (R. 160-164), and the Circuit Court of Appeals likewise so held by a divided court. (R. 203 - 214.) The jury awarded respondent said sum of $7,500.00 for the death of her husband, in accordance with the court's instructions, and the jury likewise awarded respondent the sum of $600.00 covering damage to the automobile. (R. 168.) The court entered judgment in respondent's favor and against petitioner for the aggregate sum of $8,100.00, with costs. (R. 191-192.)

Petitioner here makes no complaint of the item for $600.00 damages, but petitioner most respectfully insists that that part of the judgment awarding respondent the $7,500.00 penalty under the New Mexico penal statute (36-101) should not be sustained.

STATEMENT DISCLOSING JURISDICTION OF THIS HONORABLE COURT

Respondent filed her complaint against petitioner in the District Court of Hidalgo County, New Mexico, on April 24, 1939 (R. 6-8), and her summons was served on petitioner on April 27, 1939 (R. 8-9). By the terms of the summons, petitioner was required to appear and answer within thirty days after service of same upon him. (R. 9.) It appeared from respondent's complaint that she was a resident of the State of Texas and that petitioner was a resident of the State of Oklahoma, and that the amount in controversy, exclusive of interest and costs, exceeded $3,000.00, that is, respondent sued for $8,300.00. (R. 6-8.)

Because of the diversity of citizenship and amount involved, petitioner had the cause removed to the United States District Court for the District of New Mexico. Petitioner filed notice of intention to remove the cause on May 27, 1939, and on the same date filed his petition for removal and bond, and on the same date the State District Judge ordered the removal of the cause. (R. 6-12.) The transcript on removal was filed in the United States District Court for the District of New Mexico on June 19, 1939. (R. 8-13.) Thereafter, petitioner filed an answer in the United States District Court on June 21, 1939. (R. 17.)

The cause came on for trial at Albuquerque on September 13, 1939, and the jury awarded respondent $7,500.00 as damages for the death of her husband and the further sum of $600.00 as damages to the automobile. (R. 18 and 168.) Thereafter, on September 20, 1939, final judgment in respondent's favor and against petitioner for the aggregate sum of $8,100.00 was entered in accordance with the verdict of the jury. (R. 191-192.)

On September 29, 1939, petitioner filed his motion for a new trial, (R. 192-199), but the motion was over-ruled by an order October 11, 1939. (R. 200-201.) December 18, 1939, petitioner filed his notice of appeal to the Circuit Court of Appeals for the Tenth Circuit and filed his supersedeas bond in the sum $10,000.00 on the following day. (R. 201.) The certified transcript of the record was filed in the Circuit Court January 10, 1940. (R. 202.) The case was submitted April 22, 1940 before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges. (R. 203.) September 3, 1940, the Honorable Circuit Court of Appeals

for the Tenth Circuit affirmed the judgment in a written opinion by Honorable Sam G. Bratton (R. 203-211), a dissenting opinion being filed by Honorable Orie L. Phillips, (R. 211-214). On September 3, 1940, the judgment of the Honorable Circuit Court of Appeals was entered affirming the judgment of the lower court. (R. 214.) October 7, 1940, petitioner's motion for stay of mandate was granted by the Honorable Circuit Court of Appeals. (R. 216.)

Petitioner therefore presents his petition for writ of certiorari to this Honorable Court as authorized by Judicial Code, Section 240, as amended. (Title 28, Section 347, U. S. C. A., as amended.)

THE QUESTION PRESENTED

The sole question here presented is whether the driver of a motor freight truck, which was being operated as a common carrier of freight for hire, falls within the phrase "driver of any stagecoach or other public conveyance," and whether the majority of the Honorable Circuit Court of Appeals erred in holding that such driver is within such classification and that said penal death statute of New Mexico (36-101) is applicable to respondent's claimed action for the death of her husband, rather than the general death statute (Section 36-102), which under Section 36-104 can be enforced only by the personal representative of the estate of decedent.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

1. The Honorable Circuit Court of Appeals erred in deciding an important question of local law in a way prob-

ably in conflict with applicable local decisions, in that, the Supreme Court of New Mexico in the case of *Romero v. Atchison, Topeka & Santa Fe Railway Company,* 11 N. M. 679, 72 Pac. 37, held that said penal death statute (Section 36-101) is in derogation of the common law and therefore must be strictly construed; and the Honorable Circuit Court of Appeals, while recognizing said rule of construction, failed and refused to follow a strict construction of the statute in question; and likewise failed to follow the case of *El Paso Cattle Loan Company v. Hunt,* 30 N. M. 157, 228 Pac. 888, holding that a statute in derogation of common law must be strictly construed.

2. The Honorable Circuit Court of Appeals in affirming the judgment below wholly disregarded and refused to apply the doctrine of *ejusdem generis,* which the Supreme Court of New Mexico had adopted as the rule of construction in that state. *Grafe v. Delgado,* 30 N. M. 150, 228 Pac. 601; *Maxwell Lumber Company v. Connelly,* 34 N. M. 562, 287 Pac. 64.

3. In refusing and failing to apply the New Mexico rules of construction as above set out, the Honorable Circuit Court of Appeals wholly disregarded and refused to follow the cases of *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1187, and *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290.

4. The Honorable Circuit Court of Appeals, in the majority opinion, extended the operation of the New Mexico penal death statute (Section 36-101) in violation of Article 4, Section 18 of the Constitution of New Mexico which provides:

"No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."

5. The New Mexico penal death statute (Section 36-101), having been adopted from practically an identical statute of the State of Missouri, the construction placed upon it by the courts and legislature of Missouri was likewise adopted by the State of New Mexico; and while the State of Missouri in 1905 amended its statute to cover and include motor vehicles which had then come into more general use, New Mexico, at the time of becoming a state in 1912, re-adopted its territorial law, which was practically identical with the Missouri statute before its amendment in 1905. Therefore, the majority opinion of the Honorable Circuit Court of Appeals was erroneous in holding that a motor freight truck was included in the operation of said New Mexico penal death statute (Section 36-101) when it had never been amended to include such motor vehicles as had been done in Missouri. Article 22, Section 4, Constitution of New Mexico; *Romero v. Atchison, Topeka & Santa Fe Railway Company*, 11 N. M. 679, 72 Pac. 37; Missouri Laws of 1905, page 135; *Drolshagen v. Union Depot Railroad Company*, 186 Mo. 258, 85 S. W. 344; *Palmer v. Town of Farmington*, 25 N. M. 145, 179 Pac. 227; *Chetham-Strode v. Blake*, 19 N. M. 335, 142 Pac. 1130; *Reymond v. Newcomb*, 10 N. M. 151, 61 Pac. 205; *Henrietta Mining, etc. Company v. Gardner*, 19 S. Ct. 327, 173 U. S. 123, 43 L. Ed. 637; *Willis v. Eastern Trust Company*, 18 S. Ct. 347, 169 U. S. 295, 42 L. Ed. 752; *Hardenbergh v. Ray*, 14 S. Ct. 305, 151 U. S. 112, 38 L. Ed. 93.

6. The question involved is especially important as a

matter of public interest in the State of New Mexico, in that, the precise question has never yet been authoritatively decided by either the Supreme Court of New Mexico or the Supreme Court of the United States, and it is highly desirable that an authoritative decision be made for the guidance of the bench and bar of New Mexico, of motor common carriers, of insurance actuaries and of other persons vitally interested,—especially in view of Judge Phillips' dissenting opinion.

7. The Honorable Circuit Court of Appeals, in its majority opinion, held in a way probably in conflict with the decision of this Honorable Court, the Supreme Court of the United States, on a somewhat similar question in the case of *McBoyle v. United States*, 283 U. S. 25, 75 L. Ed. 816.

Counsel for respondents are Julian P. Harrison of El Paso, Texas, and W. C. Whatley of Las Cruces, New Mexico, and they have been duly served with copies of this petition, supporting brief and the record herein, as evidenced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief annexed hereto, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Honorable Circuit Court of Appeals for the Tenth Circuit, commanding such Honorable Court to send up forthwith a full and complete transcript of the record; that all proceedings be certified to this court and that this cause be reviewed, and the errors of the Honorable Circuit Court of Appeals be reversed and corrected as provided by law; that upon hearing by this Honorable Court, the judgment below be reversed as to the item of

$7,500.00 damages for the death of respondent's husband, and that judgment against petitioner be rendered here only for said sum of $600.00; and that petitioner recover his costs in the Circuit Court of Appeals and in this Honorable Court; and that such further proceedings be held herein as may be provided by law and equity.

ROBERT L. HOLLIDAY
El Paso, Texas

HAROLD L. SIMS
El Paso, Texas
Attorneys for Petitioner

THE STATE OF TEXAS
COUNTY OF EL PASO

Robert L. Holliday being duly sworn says that he is of counsel for Benjamin Cain, petitioner in the foregoing petition for certiorari; that he prepared the foregoing petition and that the allegations therein contained are true, and that there is just cause for same, as he verily believes.

ROBERT L. HOLLIDAY

Subscribed and sworn to before me this 31st day of October, 1940.

MARY ALICE MILLETT,
Notary Public in and for El Paso County, State of Texas.